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No. 99-1604

IN THE

Supreme Court of the United States

LORI DOLAN, *et al.*,

Petitioners,

v.

GENERAL PUBLIC UTILITIES CORP., *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY BRIEF

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Respondents argue that Court review is not warranted, because in Respondents' opinion, the reasons articulated in support of the Petition are mutually inclusive, so as to have the effect of canceling each other out. This is not the case, and furthermore, Petitioners are not familiar with any rule of law that precludes arguing alternative reasons in support of a requested relief. The case presented by Petitioners warrants review on each of the two grounds stated, and they respectfully request the Court to grant same.

Review Is Necessary To State A Rule Of Law That Restricts District Courts From Transforming A *Daubert*[1] Hearing Into A Surrogate For The Seventh Amendment Jury Trial That Should Be Conducted To Resolve Disputed Facts

Review should be granted because there is a need for the Court to definitively instruct district courts that their power to explore the reliability (and hence the admissibility) of an expert's opinion under *Daubert* is not so extensive as to allow the *Daubert* proceedings to be used as the trial on the merits for the resolution of facts and conclusions disputed by qualified experts. The need for Court review for this purpose became more acute in light of the Court's decision in *Joiner*[2], which limits the review power of a court of appeals to deciding whether a district court abused its discretion in making the reliability/admissibility determination. Indeed, with the almost routine filing of *Daubert* challenges by defendants in virtually any case that presents any issue of even mild complexity, and with the *Joiner* limit on the power of a court of appeals to review district court *Daubert* decisions, it has become all the more important for the Court to state the limits of a district court's *Daubert* inquiry to assure that district courts do not transform the gatekeeping responsibility into a surrogate for the trial on the merits where

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1. *Daubert v. Merrill Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993).

2. *General Electric Co. v. Joiner*, 522 U.S. 136 (1997).

there can only be a limited, abuse of discretion review by a court of appeals.

Although *Daubert* accords district courts the power to consider the admissibility of expert evidence, and Petitioners do not quarrel with such power in the first instance, Petitioners argue that the scope of that power is limited by the Seventh Amendment. This is especially so because of the corresponding limit on the power of a court of appeals to review a district court's decision. The *TMI* case places the issue in perspective, as it is a prime example of a district court exceeding its gatekeeping role, thereby violating the Seventh Amendment. Petitioners were prejudiced in their ability to overturn the district court's erroneous violation of the Seventh Amendment because the third circuit's review was limited to deciding if there was an abuse of discretion.

Petitioners suffered the *Daubert* exclusion of a majority of their expert evidence after the district court engaged in a far-reaching exploration into all facets of Petitioners' experts opinions, even though the district court judge was essentially ill-equipped to decide the daunting scientific issues presented. As noted in the Petition, "the district court cannot be faulted for lacking in energy . . . [and] its mistakes are traceable to its excessive zeal, and to its fervid desire to ensure that it deeply probed the reliability of the opinions of Petitioners' experts before allowing them to be admitted into evidence before a jury." Petition at 11. However, in probing the expert evidence, the district court so much as conceded that the weight of the task assigned to her was daunting and overwhelming:

> • The scientific issues before this court are similarly daunting: As a nation, we are grateful that we have experienced only one nuclear power reactor accident of the severity of the TMI accident. In the context of this litigation, . . . this translates into a lack of concrete data and knowledge. . . . This [is] a journey into unchartered waters.

In re TMI Litigation Cases Consolidated II, 911 F. Supp. 775, 788 (M.D. Pa. 1996) [J. App. 546a][3];

- [Kozubov's] methodology lacks general acceptance . . . because of the paucity of nuclear disaster[s] . . . [not] because the methodology lacks merit.

In re TMI Litigation Cases Consolidated II, 910 F. Supp. 200, 202 (M.D. Pa. 1996) [J. App. 667a];

- Whether the TMI area was or is contaminated is a central issue in this lawsuit, and a question that has remained largely unanswered in the scientific community for nearly two decades. . . . Thus, the court is placed in the uncomfortable position of making a determination as to the propriety of a particular scientific methodology where the relevant scientific community has yet to reach agreement on that very issue.

In re TMI Litigation Cases Consolidated II, 922 F. Supp. 997, 1010-11 (M.D. Pa. 1996) [J. App. 421a; 423a]

In fact, the footnote to the latter comment by the district court stated:

- [Petitioners] would argue that this is the type of factual determination that should be made by the jury, not the court. As uncomfortable as it may be for the court to make this determination, the court would abdicate its role as gatekeeper by passing this decision on to the jury.

Id. at n.15.

- Little about either *Daubert* or *Paoli II*[4] can be characterized as "well accepted."[ ] Both

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3. Since cross-petitions for certiorari have been filed, a separate bound joint appendix ("J. App.") has been filed.

4. *In re Paoli RR Yard PCB Lit.*, 35 F.3d 717 (3d Cir. 1994), *cert. denied*, 513 U.S. 1190 (1995) ("*Paoli II*").

> decisions are recent and their proper interpretation and application are currently being refined in both the judicial and academic settings.

In re TMI Litigation Cases Consolidated II, Civil Action No. 1:CV-88-1452 (M.D. Pa., slip. op. March 12, 1996) (denying Petitioners' motion for reconsideration) (footnote added).

Accordingly, in the proceedings below, the district court journeyed into the uncharted waters of daunting scientific issues and the developing *Daubert/Paoli II* law, to deeply probe expert opinions, and made wholesale exclusionary rulings based upon a preference for the scientific issues presented by Respondents' experts. As might be expected, the parties' experts disagreed on the amount of radiation releases that occurred as a result of the TMI accident. As argued in the Petition, a classic jury trial was presented, and the cross-examination process before a jury should have been resorted to rather than wholesale exclusion of expert evidence. *See* Petition at 13, *citing California v. Green*, 399 U.S. 149, 158 (1970).

Indeed, the district court was not more qualified to determine the scientific reliability of the daunting evidence presented than a jury, and in fact a jury, comprised of multiple persons with a collective wisdom may have been better equipped to consider the scientific issues presented. This is especially so, considering the fact that many of the experts upon whom Respondents relied in their *Daubert* challenge of specific Petitioners' experts, were not even qualified in the same scientific disciplines to comment on the opinions of Petitioners' experts.

For example, the expert that Respondents proffered to challenge the admissibility of the opinions proffered by Petitioners' expert Dr. Ignaz Vergeiner, was Mr. Keith Woodard, an individual paid in excess of $600,000 by Respondents between 1990 and 1995 to investigate and express opinions on behalf of Respondents. (His pre-1990 billings had been

discarded prior to the *in limine* hearings). Mr. Woodard, unlike Petitioners' expert Dr. Vergeiner, is not a meteorologist and lacked meteorological training, yet he was offered to challenge the opinions of a Ph.D. meteorologist. Mr. Woodard made an analysis of the TMI accident grounded on a computer driven, off the shelf mathematical model of radiation plume movement, which used few data points and did not take into account the meteorological and topographical particulars of the TMI accident. Mr. Woodard's analysis had been made shortly after the accident (the accident occurred in 1979) and from Respondents' perspective, became the god spell of the plume movement that resulted from the TMI accident.

Similarly, Petitioners proffered the expert opinions of Dr. James Gunkle and Professor Vladimir Shevchenko on evidence of radiation induced damage to trees. *See* Petition at 7. Respondents challenged these opinions by proffering the testimony of several forestry experts who admitted during the *in limine* hearings that they had *no* qualifications to testify about radiation issues or about plant radio-sensitivity. Respondents' experts instead proffered opinions that the tree damage that Petitioners' experts opined was caused by exposure to radiation, may have been caused by insects. However, during the *in limine* hearing, Petitioners' experts established that they ruled out other causes than radiation exposure for the damage to the trees that they had observed. Again, a jury issue was presented, but the district court chose to intrude into this sacred area and substitute her assessment of the science for that of the collective wisdom of a jury.

The amount of radiation releases resulting from the TMI accident remains, as the district court noted, subject to great debate and uncertainties even after two decades. From Petitioners' perspective, the computer models and other devices that were used by Respondents' experts to analyze the releases of radiation and the movement and dispersion of the radioactive plumes following the TMI accident were highly suspect. In fact, Dr. Jan Beyea, a Senior Energy Scientist at the National

Audubon Society, who was not an expert for either party, made an exhaustive review of many of the studies of the TMI accident and more than five years after the accident concluded:

> a great number of questions remain about the radiation doses caused by the accident. *Because the major studies on this subject were undertaken in the months soon after the March 28, 1979 accident, and completed under considerable pressure for immediate findings and reassurances, it is not surprising that these official studies cannot provide complete, scientifically justifiable answers.* Subsequent studies in the scientific and engineering literature have not resolved the residual uncertainties.
>
> * * *
>
> *Serious limitations are associated with every study that attempts to estimate the whole-body population dose of radioactivity at Three Mile Island.* These limitations are understandable: *because of the inadequacy of monitoring equipment in place at the time of the accident, all investigating groups found it necessary to make one or more key unconfirmable assumptions.* In other words, they did the best they could in spite of the gaps in the available data.

See A Review of Dose Assessments at Three Mile Island and Recommendations for Future Research (Beyea, August, 1984) ("Review of Dose Assessments") (emphasis added).

Beyea advised that the major studies of the TMI accident had "serious limitations that prevent any of them from being conclusive." *Id.*[5] For example, Beyea noted that *equipment*

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5. Dr. Beyea later published *Supplement #1 to a Review of Dose Assessments at Three Mile Island and Recommendations for Future Research* (Beyea, October, 1984) ("*Supplement 1*") for use in the further assessment of radiation doses caused by the TMI accident and to describe some new proposed research projects. *Supplement 1* at 1. (Cont'd)

which monitored the escape of radiation from the vent stack of the TMI auxiliary building, a major pathway for TMI accident releases, *was not functioning* during the accident. *Review of Dose Assessments*. This forced scientists to *estimate* how much radiation was released from the vent stack, *based on extrapolations* from other monitors. *Id.* Beyea also noted that TLDs may not have measured significant amounts of radiation because *too few TLDs* were deployed at the time of the accident, *creating large gaps* through which radiation may have passed undetected and further commented that there were *significant flaws in geiger counter measurements* taken from a helicopter that flew over the TMI facility. *Id.* Further, many measurements were taken two days into the accident, which required *extrapolation* back to the earlier levels of radiation at the time of the accident. *Id.*

Respondents and their experts were intricately involved in the studies that Beyea commented on as being nonconclusive and unreliable. It was because of these uncertainties that Petitioners and their experts re-evaluated the accident facts. Petitioners' experts performed many of the kinds of studies that Beyea recommended be undertaken. They reached different opinions and conclusions. Yet, it was the "god spell" of the early studies that were relied upon by the district court in concluding that the accident could not have happened in any way other than as argued by Respondents. Thus, the plausibility of Petitioners' experts' opinions and conclusions were measured against conclusions that remain the subject of debate.

Beyea's conclusion that the TMI data was uncertain could have persuaded reasonable and impartial minds that the early studies were flawed, and that Petitioners' experts' views through their re-analyses were at least as reliable and plausible as

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(Cont'd)

Supplement 1 did not change the primary conclusion of *Review of Dose Assessments*: that the major studies of the TMI accident contained tremendous uncertainties, and that further study of the accident was needed.

Respondents'. Petitioners' evidence should have opened the door for jury consideration of a different view, but the district court closed the gate.

Thus, there is a need for Court review to set the balance between the Seventh Amendment and a district court's *Daubert* role, in light of the *Joiner* abuse of discretion standard of review[6].

With the abuse of discretion limit to a court of appeals' review, it is important that district courts be appropriately limited in their *Daubert* inquiry so as not to transform a hearing on an evidentiary issue into a surrogate for a trial. Here, Petitioners' Seventh Amendment rights were compromised, as the *Daubert* inquiry literally transformed a hearing into a surrogate for the trial by jury, and under *Joiner*, the third circuit was constrained in its review to determining whether or not there was an abuse of discretion. *See In re TMI*, 193 F.3d at 666 [J. App. 114a][7]

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6. As noted, in *Joiner*, 522 U.S. at 138-39, the Court rejected the third circuit's view that a district court's decision on the admissibility of scientific evidence should be reviewed under a heightened or stringent abuse of discretion standard. *See In re Paoli RR Yard PCB Lit.*, 35 F.3d 717, 749-50 (3d Cir. 1994), *cert. denied*, 513 U.S. 1190 (1995). Were courts of appeal to have greater authority to review district court expert admissibility determinations, then perhaps further direction for district courts would not be as necessary because of the layer of protection that results from a broader review power.

7. Respondents' citation to the "legion" of cases in which summary judgment flowed from the exclusion of expert evidence misses the point. Brief In Opposition For Respondents at 7, n.4. Petitioners do not debate that summary judgment can be properly entered where a plaintiff cannot meet his or her summary judgment burden, whether same results from an exclusion of expert evidence or for other reasons. However, since summary judgment can and will flow from the exclusion of expert evidence, protections are necessary to prevent wholesale exclusions of expert evidence by district courts where the review of such decisions by a court of appeals is limited by the abuse of discretion standard.

The Interests Of Federal Rule Of Evidence 104 And Federal Rules Of Civil Procedure 26 And 37 Compete In A *Daubert* Context, And The TMI District Court Improperly Drew A Balance That Violated The Nature of A Fed. R. Evid. 104(a) Hearing

Respondents argue that Petitioners seek to revitalize a "trial by ambush" approach. Not only is that not the case, but the facts of the TMI circumstances belie the allegation.

As noted in the Petition, a team of experts was assembled by Petitioners to opine on various issues relating to the Three Mile Island accident. Petitioners' experts' reports were comprehensive and in some instances, hundreds of pages long. Virtually each of Petitioners' experts was deposed. Respondents never filed a Rule 26/Rule 37 motion to compel more adequate expert disclosures.

The only "ambush" that occurred in the TMI litigation was the ambush perpetrated by Respondents in persuading the district court that an expert had a limited, if any right, to respond to challenges to the expert's opinion during the *Daubert* inquiry. That rule of law adopted by the district court in connection with its "[seminal] interpretation and application [of *Daubert*] . . . in . . . the judicial . . . setting", *In re TMI*, *supra* (M.D. Pa. Slip. Op., March 12, 1996), made the so called *Daubert* inquiry virtually meaningless, for it precluded a challenged expert from having an opportunity to supplement and explain why his or her report and the methods utilized reached conclusions that were sufficiently reliable to be admitted for consideration by a jury.

Respondents cite the Advisory Committee Note to the 1993 Amendments for the proposition that Rule 26 was amended so as to avoid trial by ambush and presumably to possibly dispense with the need to depose an expert. *See* Respondents' brief at 13. The proposition is a fallacy. In the TMI litigation, as occurs in virtually every other case, expert depositions were taken and likely would have been taken regardless of the length and extent

of the expert reports. Defendants rarely waive the opportunity to take an expert deposition, and here, Respondents never argued that Petitioners' experts' reports were "of little help in preparing for [the] deposition of the witness." *Id.*

While Respondents suggest that there is no need for Court review on the propriety of the use of Civil Rules 26 and 37 to limit the scope of the record in an Rule 104(a) evidentiary hearing, their primary support comes from an academic, Professor Berger. *See* Respondents' brief at 13-14. Professor Berger has simply expressed her suggestions on how a *Daubert in limine* inquiry should be conducted, but her perspective on the interplay between the *Daubert* inquiry and a Federal Rule of Evidence 104 hearing is *not* authoritative for overruling this Court's decision in *Bourjaily v. United States*, 483 U.S. 171 (1987).

It is plainly clear that Respondents cite no Supreme Court precedent that addresses the issue. Yet, this Court's decision in *Bourjaily v. United States*, 483 U.S. 171 (1987) speaks loudly for the proposition that the information to be considered by a district court in the context of a Federal Rule of Evidence 104(a) hearing is very broad, even if the information is otherwise inadmissible. *Bourjaily* has not been overruled, but in the *Daubert* hearings here, the district court found Fed. R. Civ. P. 26 to govern the proceedings. This improper procedural ruling demonstrates that the district court wrongly perceived its role in the *Daubert* inquiry to be the equivalent of the ultimate fact finder in a proceeding that was conducted as the surrogate for a trial on the merits. The application of trial-like evidentiary rules on the admissibility of evidence during the course of a preliminary hearing which was not conducted in the presence of a jury, was wrong.

CONCLUSION

The Petition for writ of certiorari should be granted.

Respectfully submitted,

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